IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE PENN MUTUAL LIFE INSURANCE COMPANY,	:	
Plaintiff,	:	
v.	:	C.A. No. 09-300-JJF
NORMA ESPINOSA 2007-1 INSURANCE TRUST, and CHRISTINA BANK & TRUST COMPANY, as trustee of the NORMA ESPINOSA 2007-1 INSURANCE TRUST, KEVIN BECHTEL, INFINITY WEALTH ADVISORS, LLC, and STEVEN BRASNER,	:	
Defendants.	:	

Stephen C. Baker, Esquire; Jason P. Gosselin, Esquire; Katherine L. Villanueva, Esquire; and Elizabeth L. McLachlan, Esquire, of DRINKER BIDDLE & REATH LLP, Philadelphia, Pennsylvania. David P. Primack, Esquire, of DRINKER BIDDLE & REATH LLP, Wilmington, Delaware.

Attorneys for Plaintiff.

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Attorneys for Defendants.

MEMORANDUM OPINION

July 30, 2010
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court are Plaintiff The Penn Mutual Life Insurance Company's Motion To Dismiss Defendants' Counterclaims (D.I. 14), and Defendants Norma Espinosa 2007-1 Insurance Trust and Christiana Bank and Trust Company's Motion to Dismiss Amended Complaint (D.I. 43).[1] For the reasons discussed, Plaintiff's Motion will be granted in part and denied in part, and Defendant's Motion will be denied.

I. Background

On April 27, 2009, Plaintiff The Penn Mutual Life Insurance Company ("Plaintiff") initiated this declaratory judgment action against Defendants Norma Espinosa 2007-1 Insurance Trust (the "Espinosa Trust") and Christiana Bank and Trust Company ("Christiana Bank"), as trustee of the Espinosa Trust (collectively, "Defendants"). (D.I. 1.) The dispute stems from a life insurance policy issued by Plaintiff to the Espinosa Trust on the life of Norma Espinosa ("Ms. Espinosa"). (Id. ¶ 2.)

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[1] On June 28, 2010, Defendant Kevin Bechtel, acting pro se, filed a Motion To Dismiss And To Strike (D.I. 51) regarding Plaintiff's Amended Complaint. Plaintiff opposes Defendant Bechtel's Motion, and additionally filed a Motion For Leave To Amend Its Amended Complaint For Declaratory Judgment (D.I. 55). Defendants Espinosa Trust and Christiana Bank have indicated that the proposed amendments "will not have any effect on the grounds for dismissal" they raise, and request that the Court defer consideration of Plaintiff's Motion For Leave To Amend until after ruling on their Motion To Dismiss. (D.I. 62.) For this reason, and because Defendant Bechtel has not yet responded to Plaintiff's Motion For Leave To Amend, the Court will not consider Defendant Bechtel's Motion To Dismiss And To Strike, or Plaintiff's Motion For Leave To Amend in this Memorandum Opinion.

Plaintiff alleges that Ms. Espinosa, who was seventy-nine years old at the time, was approached by Steven Brasner, the president of Infinity Wealth Advisors, LLC, Kevin Bechtel, and/or other promoters to participate in a stranger oriented life insurance ("STOLI")[2] scheme. (Id. ¶ 17.) Plaintiff alleges that the Espinosa Trust was created on March 22, 2007, and that Ms. Espinosa applied for a $10 million life insurance policy on March 26, 2007 (the "Application"). (Id. ¶¶ 19, 23.) The Application was subsequently amended to apply for $7 million in coverage, and a policy was issued by Plaintiff on April 28, 2007 (the "Espinosa Policy"). (Id. ¶¶ 20, 32.)

Plaintiff generally alleges that "neither the [Espinosa T]rust not the [Espinosa P]olicy were intended for estate liquidity, financial planning, or other legitimate insurance-related purposes," but rather, "it was intended from the outset that the policy would be transferred to an investor in the secondary market, and the use of the trust was to conceal the true purpose of the policy." (Id. ¶ 18.) More specifically, Plaintiff alleges that the Application contained six material misrepresentations made to conceal that the Espinosa Policy was being sought for purposes of resale in the secondary market, that

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[2] STOLI refers to an arrangement in which speculative investors in a secondary market seek to obtain pecuniary interests in life insurance policies on individuals with whom they have no prior relationship. (D.I. 1 ¶ 7.)

Ms. Espinosa transferred the Espinosa Policy and any beneficial interest in the Espinosa Policy and Espinosa Trust to an investor, and that Ms. Espinosa was compensated for her role in this scheme. (Id. ¶¶ 32-36.)

Plaintiff seeks declarations that: (1) the Espinosa Policy is void ab initio or should be considered rescinded based on a series of alleged misrepresentations in the Application; and (2) that the Espinosa Policy is void ab initio based on a lack of insurable interest at its inception. (Id. ¶¶ 52, 57.) By its Amended Complaint, filed February 25, 2010, Plaintiff repeats the same factual allegations, but additionally names Kevin Bechtel ("Bechtel"), Steven Brasner ("Brasner"), and Infinity Wealth Advisors, LLC as Defendants and adds a third count for damages for Plaintiff's reliance on Defendants' alleged misrepresentations. (D.I. 3.) Defendants assert two counterclaims against Plaintiff, seeking: (1) a declaration that, inter alia, the Espinosa Policy is in full force and effect and that Plaintiff may not rescind the Espinosa Policy; and (2) damages for breach of contract stemming from Plaintiff's anticipatory repudiation of its contractual obligations. (D.I. 12.)

II. Legal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move for dismissal based on a plaintiff's

"failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept all factual allegations in a complaint as true and view them in the light most favorable to the plaintiff. See Christopher v. Harbury, 536 U.S. 403, 406 (2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Assuming the factual allegations are true, even if doubtful in fact, the "factual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). While the complaint need not make detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id. (internal quotations and citations omitted). Thus, stating a claim upon which relief can be granted "'requires a complaint with enough factual matter (taken as true) to suggest' the required element" of a cause of action. Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)(citing Twombly, 550 U.S. at 556.) In sum, if a complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), then

the complaint is "plausible on its face," and will survive a motion to dismiss under Rule 12(b)(6). Twombly, 550 U.S. at 570.

III. Defendants' Motion to Dismiss Amended Complaint (D.I. 43)[3]

A. Parties' Contentions

By its Motion To Dismiss, Defendants contend that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted because Bechtel and Brasner were appointed as Plaintiff's soliciting agents as defined by 18 Del. C. § 1702(b).[4] (D.I. 44, at 6-8.) Further, Defendants note that Plaintiff filed notice of their appointment as agents with the Insurance Commissioner. (Id. at 9.) As a result, Defendants contend that Plaintiff cannot argue that Bechtel and Brasner were not acting as Plaintiff's agents. (Id. at 8.) Defendants contend that Bechtel and Brasner were acting on behalf of Plaintiff when they allegedly made the representations at issue, and that Plaintiff's attempt to impute Bechtel's and Brasner's acts to the Espinosa Trust not only violates Delaware law, but

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[3] Because Plaintiff seeks dismissal of Defendants' declaratory judgment counterclaim on the basis that the counterclaim is redundant of Plaintiff's Complaint, the Court will consider Defendants' Motion first, although it is later-filed.

[4] 18 Del. C. § 1702(b) provides that "'Agent of the insurer' means a licensed producer of the Department [of Insurance] appointed by an insurer to sell, solicit or negotiate applications for policies of insurance on its behalf and, if authorized to do so by the insurer, to issue conditional receipts." 18 Del. C. § 1702(b).

also fails to satisfy minimum pleading standards. (Id. at 11-12.) Accordingly, Defendants contend that Plaintiff is barred from relying on representations made by Bechtel and Brasner as a basis for seeking relief because an insurer "may not avoid its obligations to provide coverage under an insurance policy based on representations made by its agent." (Id. at 11.)

In response, Plaintiff contends that Defendants' Motion To Dismiss should be denied in its entirety because there is no rule of law that "a defrauded principal is left with no recourse against guilty third parties where such parties acted alongside the principal's agent." (D.I. 47, at 1-2.) Plaintiff admits that Bechtel and Brasner were its soliciting agents (id. at 6), but argues that Delaware law clearly establishes that an agent's representations are not imputed to the principal where the agent acts in his own self-interest, or where the agent colludes with a third party to defraud the principal. (Id.) Plaintiff contends that it has specifically detailed the alleged misrepresentations by Bechtel and Brasner, thus meeting minimum pleading standards. (Id. at 9.) Further, Plaintiff contends that the facts plead, if accepted as true, establish that Bechtel and Brasner made the misrepresentations to advance their own self-interest, and that they colluded with the Espinosa Trust and Christiana Bank. (Id. at 8.) Accordingly, Plaintiff contends that the acts and statements of Bechtel and Brasner cannot be imputed to Plaintiff

as a matter of law, and the Amended Complaint should not be dismissed. (Id.)

Defendants reply that the adverse interest exception is inapplicable, and that Plaintiff's allegations that it collected premium payments for the Espinosa Policy foreclose reliance on the adverse interest exception. (D.I. 50, at 8-9.)

B. Discussion

The Court concludes that Plaintiff has sufficiently pled that a fraud was perpetuated on it such that the acts of Bechtel and Brasner are not imputed to Plaintiff. An agent represents his principal contractually, and binds his principal by the contracts he makes. Heller v. Kiernan, C.A. No. 1484-K, 2002 WL 385545, at *4 (Del. Ch. Feb. 27, 2002). "A principal is liable for the fraud of an agent even though the fraud was committed without the knowledge, consent or participation of the principal if the act was done in the course of the agent's employment and within the apparent scope of the agent's authority." In re Brandywine Volkswagen, Ltd., 306 A.2d 24, 27 (Del. Super. 1973); see also Restatement (Third) of Agency § 5.04 cmt. c (2006)("A principal assumes the risk that the agents it chooses to interact on its behalf with third parties will, when actual or apparent authority is present, bind the principal to the legal consequences of their actions."); cf. Rust v. Metro. Life Ins. Co., 172 A. 869, 872 (Del. Super. 1934)("where the [insurance

policy] application is drawn by the authorized agent of the insurer, and the answers to the interrogatories contained therein are written by him in filling the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument between the parties thereto.")

An exception to the general rule that an agent's knowledge is imputed to his principal exists when the agent's own interests become adverse to the principal's interests. MetCap Sec. LLC v. Pearl Senior Care, Inc., C.A. No. 2129-VCN, 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007)(citations omitted); see also Restatement (Third) of Agency § 5.04 (2006)("notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter"). Further, "[a] principal should not be held to assume the risk that an agent may act wrongfully in dealing with a third party who colludes with the agent in action that is adverse to the principal." Restatement (Third) of Agency § 5.04 cmt. c (2006). Accordingly, imputation of knowledge to the principal does not protect third parties who know or have reason to know that the agent acts adversely to the principal, and have not acted in good faith. Id. § 5.04 cmt. b.

Plaintiff alleges that Bechtel and Brasner approached Ms. Espinosa about participating in a STOLI scheme in which Ms.

Espinosa would apply to Plaintiff for a life insurance policy, and conceal from Plaintiff the intent to sell, and/or transfer interest in, the policy to a secondary market investor. (D.I. 39 ¶ 20.) Plaintiff further alleges that Bechtel and Branser acted together with and on behalf of the Espinosa Trust when they submitted the Agent's Underwriting Report, which contained material misrepresentations about the intent to transfer the Espinosa Policy to the secondary market. (Id. ¶ 62.) Taking these factual allegations as true, Plaintiff has alleged facts sufficient for the Court to infer that Bechtel and Brasner colluded with the Espinosa Trust and acted in their own self-interests, adversely to Plaintiff, and thus, that Plaintiff was not bound by Bechtel's and Brasner's actions and statements.

Further, the Court is not persuaded by Defendants' contention that Plaintiff's own allegations foreclose its reliance on the adverse interest exception. Although Defendants have not pointed to any definitive statement from a Delaware court, interpreting Delaware law, the clear weight of authority indicates that invocation of the adverse interest exception requires that the agent act solely in his own interest and entirely against the principal's interest. See In re Am. Int'l Group, 965 A.2d 763, 827 (Del. Ch. 2009)(interpreting New York law)(declining to apply adverse interest exception in the context

of a motion to dismiss where "the Complaint is replete with ways in which [the principal] itself can be thought to have benefited from the [agent's] fraudulent schemes, even if those benefits turned out to be short-lived once the fraud was discovered"); Collins & Aikman Corp. v. Stockman, C.A. No. 07-265-SLR-LPS, 2010 WL 184074, at *5 (D. Del. Jan. 19, 2010)(interpreting Michigan law)(the "'adverse interest' exception is inapplicable if the [agent]'s actions benefit or are motivated to benefit, at least in part, the [principal]"); see also Restatement (Third) of Agency § 5.04 (2006) cmt. c. (stating that an agent acts adversely to a principal when, in dealing with third parties, an agent takes action intending solely to benefit the agent or another person).

In its Amended Complaint, Plaintiff states that it has, to date, "received an aggregate of $680,676.66 in premium payments in connection with the Espinosa Policy." (D.I. 39 ¶ 41.) Plaintiff also alleges that as a result of the alleged STOLI scheme, "Plaintiff has incurred significant expenses, costs and damages, including the payment of commissions to the soliciting agents [Becthel and Brasner] for the Espinosa Policy." (Id. ¶ 42.) In view of the liberal pleading rules, the Court concludes that Plaintiff has sufficiently alleged that Bechtel's and Brasner's interests in this transaction were entirely adverse to Plaintiff's. Whether, in fact, Becthel's and Brasner's interests

were adverse to Plaintiff's such that their alleged actions and misrepresentations are imputed to Plaintiff as a matter of law is a determination that need not be made at this stage of the litigation.

Finally, to the extent Defendants contend that Plaintiff has failed to meet minimum pleading standards, the Court rejects that contention. Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The circumstances of the alleged fraud must be pled with sufficient particularity "to place [] defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). Upon review of the Amended Complaint, the Court concludes that Plaintiff has pled the circumstances of Defendants' alleged conduct with particularity (see D.I. 39 ¶¶ 36, 62-69), and that Defendants have been put on notice of the precise misconduct with which they are charged.

Accordingly, Defendants' Motion to Dismiss will be denied.

IV. Plaintiff's Motion To Dismiss Defendants' Counterclaims (D.I. 14)

A. Parties' Contentions

By its Motion To Dismiss, Plaintiff contends that both of

Defendants' counterclaims should be dismissed. (D.I. 15, at 1.) Plaintiff contends that Defendants' claim for declaratory judgment is duplicative of Plaintiff's claims in that the issues related to the validity of the Espinosa policy will necessarily be decided in the context of Plaintiff's claims. (Id. at 3-5.) Because Defendants' declaratory judgment claim is redundant and unnecessary, according to Plaintiff, it should be dismissed. (Id.) With regard to the breach of contract counterclaim, Plaintiff contends that Defendants' allegation that it has breached the Espinosa Policy by "anticipatorily repudiating its obligation to provide benefits" is an unsupported legal conclusion. (Id. at 5.) Moreover, Plaintiff argues that Defendants have failed to sufficiently plead an anticipatory breach of contract because Defendants have not alleged any statement of unequivocal refusal to perform an obligation under the Espinosa Policy. (Id. at 5-7.)

Defendants respond that they have adequately plead both counterclaims. (D.I. 16, at 2.) Defendants contend that their declaratory judgment counterclaim is not merely redundant of Plaintiff's claims. (Id. at 8.) Rather, Defendants seek a broader declaration of their rights under the Espinosa Policy than the dispute framed by Plaintiff; specifically, a ruling adverse to Plaintiff on its claims would only result in a judgment that Plaintiff may not rescind or void the Espinosa

Policy, but Defendants are seeking a judgment that the Espinosa Policy is valid and enforceable for all purposes. (Id. at 8-9.) In addition, Defendants contend that it is routine practice for insureds to bring declaratory judgment counterclaims when an insurer seeks rescission of a policy, and that judicial efficiency is promoted when all issues can be decided in a single proceeding. (Id. at 10-11.) With regard to their breach of contract claim, Defendants contend that they have alleged Plaintiff has unjustifiably attempted to rescind the Espinosa Policy, which constitutes an anticipatory breach under Delaware law. (Id. at 12.) According to Defendants, by bringing the action, Plaintiff has essentially taken the position that it will only honor the Espinosa Policy if ordered to do so by the Court, and this amounts to a repudiation. (Id. at 13.)

B. Discussion

1. *Whether Defendants' Declaratory Judgment Counterclaim Should Be Dismissed*

The Third Circuit has suggested that dismissal of a declaratory judgment counterclaim is appropriate "where it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim," and where "the prayer for declaratory relief is redundant and [would] bec[o]me moot upon disposition of the counterclaim." Aldens v. Packel, 524 F.2d 38, 51-52 (3d Cir. 1975)(citing 6 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure §

1406 (1971)). District courts in the Third Circuit have dismissed declaratory judgment counterclaims when such a complete identity of legal and factual issues exists. See e.g., Principal Life Ins. Co. v. Minder, C.A. No. 08-5899, 2009 U.S. Dist. LEXIS 56568, at *5 (E.D. Pa. July 1, 2009)(Bartle, J.). But see Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc., 457 F. Supp. 1158, 1161-62 (E.D. Pa. 1978)(Luongo, J.)("I know of no rule preventing the assertion of a counterclaim merely because the theory relied upon is the converse of that in the complaint."). However, "[c]onsidering the difficulty in determining whether a declaratory judgment counterclaim is in fact redundant prior to trial, . . . authorities suggest that a court should dismiss such counterclaims only when there is no doubt that they will be rendered moot by adjudication of the main action." Principal Life Inc. Co. v. Lawrence Rucker 2007 Ins. Trust, 674 F. Supp. 2d 562, 566 (D. Del. 2009)(Thynge, J.)(citations omitted).

Defendants seek a declaration that there is no basis for rescission of the Espinosa Policy, and that Plaintiff's purported rescission is invalid. (D.I. 12 ¶ 95.) In this respect, the declaratory judgment counterclaim is redundant of Count I of Plaintiff's Amended Complaint. In Count I of its Amended Complaint, Plaintiff seeks a declaration that the Espinosa Policy is void because it was issued in reliance on material

misrepresentations. A finding in Plaintiff's favor that the Espinosa Policy is void on these grounds necessarily moots the declaration sought by Defendants. Alternatively, Plaintiff seeks a declaration that the alleged misrepresentations constitute grounds for rescission. A finding in Plaintiff's favor on the alternative grounds of Count I (i.e., that there are grounds for rescission based on misrepresentations) effectively denies the relief sought by Defendants. Conversely, a finding adverse to Plaintiff on the alternative grounds of Count I effectively grants Defendants the declaration sought- that Plaintiff's purported basis for rescission is incorrect.

Defendants additionally seek a declaration that an insurable interest existed at the inception of the Espinosa Policy. (D.I 12 ¶ 96.) In this respect, the declaratory judgment counterclaim is redundant of Count II of Plaintiff's Amended Complaint, which seeks a declaration that the Espinosa Policy is void because it lacked an insurable interest at inception. A complete identity of legal and factual issues exists, and a finding adverse to Plaintiff on Count II effectively grants Defendants the declaration sought- that an insurable interest existed at inception.

Further, Defendants seek declarations that Plaintiff is bound by the representations of its agents, and that any fraud or misrepresentations by its agents are imputed to Plaintiff. (D.I.

12 ¶¶ 97, 98.) In these respects, the declaratory judgment sought by Defendants is not redundant of Plaintiff's claims. Defendant implicates legal and factual issues related to agency that will not necessarily be mooted by a determination on Plaintiff's claims. For example, a decision adverse to Plaintiff on Count I (i.e., that the Espinosa Policy is not void for being issued in reliance upon material misrepresentations) does not resolve whether Bechtel and Branser were nevertheless acting adversely to Plaintiff's interests and whether their representations were imputed to Plaintiff.

Finally, to the extent Defendants seek a declaration that the Espinosa Policy is otherwise valid and in full force and effect (D.I. 12 ¶¶ 95, 100), their counterclaim fails for lack of an actual controversy. Pursuant to the Declaratory Judgment Act, a federal court may "declare the rights and other legal relations of any interested party seeking such declaration," where a "case of actual controversy" exists. 28 U.S.C. § 2201. A "case of actual controversy" means one of a justiciable nature. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 325 (1936). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937). In other words, "[i]t must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as

distinguished from an opinion advising what the law would be upon a hypothetical set of facts." Id. at 241. Further, the controversy must be ripe for judicial adjudication, meaning that it cannot be "nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 244 (1952).

Plaintiff has stated that if it does not prevail in the present action, it "will pay the death benefit upon the death of Norma Espinosa, assuming all other conditions are satisfied at the time of a claim." (D.I. 15, at 7.) Thus, aside from the invalidity contentions it raised in the present action, Plaintiff does not otherwise dispute that the Espinosa Policy remains valid and in full force and effect. Defendants contend that they "should not be forced to wait and see what other conditions [Plaintiff] will ultimately raise or risk having to litigate the validity of the Espinosa Policy again in the future." (D.I. 16, at 8.) Defendants' concern is unfounded because claim preclusion principles will likely prevent Plaintiff from bringing additional claims regarding the validity of the Espinosa Policy which it could have brought in the present action. See Lawrence Rucker, 674 F. Supp. 2d at 566 (finding the defendant's concern that the

plaintiff might attempt to litigate the insurance policy's validity in successive lawsuits to be unfounded because of claim preclusion principles); see also Pfizer, Inc. v. Ranbaxy Labs., Ltd., 525 F. Supp. 2d 680, 688 (D. Del. 2007)(citing Lubrizol v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991))(claim preclusion requires "that a plaintiff present in one suit all of the claims for relief that he may have arising out of the same transaction or occurrence").

Accordingly, the Court concludes that Plaintiff's Motion will be granted in part and denied in part with respect to Defendants' declaratory judgment counterclaim.

2. *Whether Defendants' Breach Of Contract Counterclaim Should Be Dismissed*

Stating a claim for breach of contract requires the plaintiff to plead the following elements: (1) the existence of the contract; (2) a breach of an obligation imposed by that contract; (3) resulting damages to the plaintiff. VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). "An anticipatory repudiation [of a contract] constitutes a breach." E.g., Cochran v. Denton, C.A. No. 11826, 1991 WL 220547, at *1 (Del. Ch. Oct. 28, 1991). With regard to what constitutes repudiation of a contract, the Delaware Court of Chancery has stated:

> A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions. Repudiation

> may be accomplished through words or conduct. A party may repudiate an obligation through statements when its language, reasonably interpreted, indicates that it will not or cannot perform; alternatively, a party may repudiate through a voluntary and affirmative act rendering performance apparently or actually impossible. In any event, repudiation must be positive and unconditional.

West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, C.A. No. 2742-VCN, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009)(internal citations and quotations omitted).

The Court concludes that Defendants' breach of contract counterclaim does not contain sufficient factual allegations for the Court to reasonably infer that Plaintiff has anticipatorily repudiated, and therefore, Defendants fail to raise their right to relief above a speculative level. Defendants allege that Plaintiff anticipatorily repudiated the Espinosa Policy by "repudiating its obligation to provide benefits under the Policy upon the death of Norma Espinosa," and by "seeking to retain the premiums paid for the Policy while stating its intention not to honor its coverage obligations." (D.I. 12 ¶¶ 105-106.) From Defendants' submissions, it is clear that the only act of repudiation alleged to have been committed by Plaintiff is the filing of the present action. (See id. ¶¶ 83-90; D.I. 16, at 12.)

District courts in the Third Circuit have repeatedly held that "statements made in the context of a declaratory judgment

action are insufficient to establish repudiation as a matter of law." Lawrence Rucker, 674 F. Supp. 2d at 568; see also Minder, 2009 U.S. Dist. LEXIS 56568, at *10 ("[S]eeking a declaratory judgment concerning one's rights and obligations under a contract does not constitute a repudiation of that contract under Pennsylvania law."); Principal Life Ins. Co. v. DeRose, C.A. NO. 08-cv-2294, 2009 U.S. Dist LEXIS 109130, at *25 (M.D. Pa. Oct. 28, 2009), adopted by 2009 U.S. Dist. LEXIS 109126 ([T]he fact that [plaintiff] has . . . fil[ed] a complaint seeking declaratory relief in federal court is insufficient to state a claim for anticipatory repudiation"). Further, in the Court's view, Defendants mischaracterize the nature of a declaratory judgment action. That an interested party to an actual controversy seeks a determination of its rights and other legal obligations as permitted under 28 U.S.C. § 2201, should not automatically equate to an unconditional refusal to perform its contractual obligations. As the Court in Lawrence Rucker recently recognized, "an action for declaratory judgment does not indicate an unconditional refusal to comply with contractual obligations, but rather an attempt to carry them out. In effect, [Plaintiff] is stating its belief that the [Espinosa] Policy is invalid . . . but is asking the court to determine whether that believe is sound." Lawrence Rucker 2007 Ins. Trust, 674 F. Supp. 2d at 568.

Defendants' reliance on Tenneco Auto., Inc. v. El Paso Corp., C.A. No. 18810-NC, 2007 WL 92621 (Del. Ch. Jan. 8, 2007), is also misplaced. In Tenneco, the Delaware Court of Chancery held that "[r]epudiation of a contract of insurance does not first require that the insured undergo a loss, file a claim with its insurer, and then be denied coverage." Tenneco, 2007 WL 92621, at *4. Rather, "[c]ommitting to revoke coverage would alone, if wrongful, constitute anticipatory repudiation." Id. In the present action, the Court concludes that Plaintiff has not committed itself to revoking coverage under the Espinosa Policy, but rather, has committed a determination of the validity of the Espinosa Policy to the Court. See Lawrence Rucker, 674 F. Supp. 2d at 568 (distinguishing Tenneco and finding that plaintiff did not wrongfully extinguish an insurance policy by initiating a declaratory judgment action).

Accordingly, the Court concludes that Plaintiff's Motion to Dismiss will be granted with respect to Defendants' breach of contract counterclaim.

V. Conclusion

For the reasons discussed, Defendants' Motion to Dismiss Amended Complaint will be denied, and Plaintiff's Motion To Dismiss Defendants' Counterclaims will be granted in part and denied in part. Specifically, with respect to Defendants' declaratory judgment counterclaim, dismissal will be granted on

the redundant counterclaim and the counterclaim seeking a declaration that the Espinosa Policy is otherwise valid and in full force and effect. Dismissal will be denied on the counterclaim seeking a declaration that Plaintiff is bound by the representations of its agents, and that any fraud or misrepresentations by its agents are imputed to Plaintiff. With respect to Defendants' breach of contract counterclaim, dismissal will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE PENN MUTUAL LIFE INSURANCE COMPANY,	:	
Plaintiff,	:	
v.	:	C.A. No. 09-300-JJF
NORMA ESPINOSA 2207-1 INSURANCE TRUST, and CHRISTINA BANK & TRUST COMPANY, as trustee of the NORMA ESPINOSA 2007-1 INSURANCE TRUST, KEVIN BECHTEL, INFINITY WEALTH ADVISORS, LLC, and STEVEN BRASNER,	:	
Defendants.	:	

ORDER

At Wilmington, this 30 day of July 2010, for the reasons set forth in the Memorandum Opinion issued this date;

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiff The Penn Mutual Life Insurance Company's Motion To Dismiss Defendants' Counterclaims (D.I. 14) is **GRANTED IN PART** and **DENIED IN PART** as follows:

    a. Plaintiff's Motion is **GRANTED IN PART** and **DENIED IN PART** with respect to Count I (Declaratory Judgment) of Defendants' Counterclaims. Plaintiff's Motion is **GRANTED** with respect to the redundant counterclaim and the counterclaim seeking a declaration that the Espinosa Policy is otherwise valid and in full force and effect.

Plaintiff's Motion is **DENIED** with respect to the counterclaim seeking a declaration that Plaintiff is bound by the representations of its agents, and that any fraud or misrepresentations by its agents are imputed to Plaintiff;

b. Plaintiff's Motion is **GRANTED** with respect to Count II (Breach of Contract) of Defendants' Counterclaims;

2. Defendants Norma Espinosa 2007-1 Insurance Trust Christiana Bank and Trust Company's Motion to Dismiss Amended Complaint (D.I. 43) is **DENIED**.

UNITED STATES DISTRICT JUDGE